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ABSTRACT

The Communications Act of 1934 is no longer adequate as a statement of United States national policy. The events of the last ten years in the domestic marketplace have shown that a national policy favoring competition in the provision of telecommunications services can now bring significantly greater benefits to the consumer than a national policy favoring regulation. If Congress fails to make changes in the law, there will be a continuation of a long series of disruptive policies being established by our judiciary system under the inadequate guidance of an outdated statute. Changes in the Communications Act of 1934 must also include changes in the approach to international telecommunications. Revisions would provide for a clear statement of national policy favoring competition, recognize the cooperative nature of international telecommunications, and create a more flexible environment for service providers and a more beneficial environment for consumers. (HOD)

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Deregulation and Competition
or

How I Became a True Believer in Marketplace Forces

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In the past few years, there have been dramatic changes occurring in the provision and regulation of domestic telecommunications services within the United States. Now, as a result of actions on the part of the Federal Communications Commission in December 1979 and May 1980, seeking to extend the U.S. policy of competition, deregulation and reliance on marketplace forces to the provision of international services as well, there is a veritable explosion of interest in the rationale for such steps as well as concern and curiosity as to the likely outcome.

In order to explain the U.S. policy impetus that led to these actions, as well as to discuss some of the hoped for benefits and possible detriments, it will be helpful first to describe the evolution of the major domestic policies, their impact, and how regulation of international facilities and services has similarly evolved. A description of the regulatory process and some specific actions taken in the international sphere, juxtaposed with the dramatic actions in the domestic area, will set the stage for a brief description of the more recent international policy decisions. Finally, I will discuss some of the efforts to revise U.S. law regarding regulation of and appropriate U.S. Government involvement in international telecommunications.

I am a former regulator. For six years at the Federal Communications Commission, I worked to carry out the mandate of the Communications Act of 1934, an arcane document which has been described as the zenith of abdication of Congressional responsibility to a U.S. regulatory agency. The time of this law's passage was the New Deal era, when the U.S. Government, and particularly Franklin Roosevelt, decided that to ensure the welfare of U.S. citizens extensive governmental supervision over numerous private activities was required.

The common carrier area was perceived as appropriately the domain of a natural monopoly, e.g., primarily AT&T and Western Union, and thus regulatory controls were enacted to provide for rate-base regulation -- that is, the Commission would pass upon common carriers' applications to make capital investments, ostensibly determining whether such investments were required in the "public interest" and thus permitting the carriers to earn a specified rate of return on investment. This scheme was designed to provide stockholders in the privately held, regulated companies with secure, attractive investments and to assure ratepayers of reasonable rates. The system of rate-base regulation meant slow but steady progress. I wasn't around in the 1930's, or for that matter the '40's, '50's, or '60's, so I cannot provide insight into the success of the system in those decades. But, by the 1970's, it was apparent that the telecommunications industry was beginning to bust the seams of the 1934 Communications Act.

Although the 1934 Act in a sense applied the same regulatory requirements to international as well as domestic communications

services and carriers, it did not address specifically any of the peculiarities of the international market. More as an effort to provide a means of ensuring a viable domestic telegraph industry than as an attempt to rectify this gap in the original law, the addition of Section 222 in 1943 addressed international communications by dividing international and domestic markets and provision of voice and record services. This new section essentially froze market shares in the provision of international services as of that time. From a regulatory standpoint, it was already difficult and somewhat inappropriate (in view of the cooperative nature of international communications) to apply the 1934 Act to applications for international facilities, services and tariff filings. Section 222 added a layer of complexity, and increasingly absurdity, to regulation of the international sphere.

An additional element, further complicating regulation, was the enactment of the Communications Satellite Act of 1962. That Act, as well as U.S. policy, necessitated regulatory actions which would encourage the development and use of a global satellite system.

While those of us who specialized in international telecommunications were valiantly struggling to adapt the Act to the international environment, dramatic advances were being made in the domestic area. Efforts to stimulate the marketplace in domestic telecommunications had been taking place over a number of years, with permitting connection of customer-supplied terminal connection signalling the advent of numerous other pro-competitive actions to come. 1/

1/ See Hush-a-Phone v. U.S., 238 F. 2d 266 (D.C. Cir. 1956), and Carterfone, 13 FCC 2d 420 (1968), recon. den. 14 FCC 2d 571 (1969). See also North Carolina Utilities Commission v. FCC, 537 F. 787 (4th Cir. 1975), cert. den. 429 U.S. 1027 (1976).

Following the Commission's landmark decision in Carterfone, in which it established the principle that such interconnection of customer procured equipment should be permitted if "privately useful without being publicly detrimental," the Commission sought to encourage provision of innovative services tailored to special needs of users by authorizing provision of private line services by carriers in addition to AT&T and Western Union. ^{2/} The Commission believed that permitting the entry of new common carriers into the U.S. domestic marketplace would expand the availability of new services, giving consumers greater flexibility and a wider range of choices among offerings. This was seen to be particularly crucial for data communications users whose requirements were based upon a need for computer compatible digital technology. The Commission expected that the introduction of competition would stimulate technical innovation, the introduction of new techniques and the development of new services to meet previously unsatisfied consumer demand.

The last ten years have shown that the Commission's expectations were modest. We have witnessed a responsiveness in the U.S. Domestic marketplace which exceeds the prophecies made in the beginning of the decade. A catalogue of benefits to the U.S. consumer would include improved service quality and lower costs, as well as the expansion of the marketplace itself. Technology has driven competition and has, in turn, blossomed. New services now being offered -- or proposed -- include some of a highly innovative nature and the use of sophisticated computing equipment for switching which has allowed the introduction of a host of specialized services. Many analysts recognize that the boom in our information industry is due in no small part to regulatory actions designed

^{2/} See Specialized Common Carriers, 29 FCC 2d 870 (1971), aff'd. sub nom., Washington Util. & Trans. Commission v. FCC, 513 F. 2d 1142 (9th Cir. 1975).

to spur innovation.

While the benefits foreseen by the Commission from its Specialized Common Carrier Decision have clearly come to pass, the detriments predicted have not. Opponents of new entry argued that "cream skimming" would cause a substantial -- and severely detrimental -- diversion of revenue. However, in its investigation of the economic impact of competition, the Commission has not found any detrimental impact which would require a reexamination of its pro-competitive policies. ^{3/}

Interestingly, the Commission's authorization of entry by a specialized common carrier, MCI, has led to competition in the provision of domestic MTS and WATS service, a result not originally contemplated by the Commission in authorizing MCI's EXECUNET service, which was characterized as a private line offering. In a fascinating chain of legal events, the Court of Appeals found that the FCC could not restrict the scope of MCI's offering in terms of services without providing explicit public reasons for so doing. ^{4/} In order to resolve the general question of whether it was in the public interest to require provision of MTS and WATS service on a monopoly basis, the Commission instituted its MTS/WATS Inquiry ^{5/}, in which it recently concluded that there was already competition in the provision of these services, without detrimental public impact.

^{3/} For a comprehensive discussion concerning the impact of permitting competition in the provision of terminal equipment and private line services, see Customer Interconnection, 61 FCC 2d 767 (1976) and 75 FCC 2d 506 (1980).

^{4/} MCI v. FCC (EXECUNET I), 60 FCC 2d 25 (1976), 561 F. 2d 365 (1977), cert. den. 434 U.S. 1040 (1978). MCI v. (EXECUNET II), 580 F. 2d 590 (1978), stay denied, 436 U.S. 915 (1978), cert. den. 439 U.S. 980 (1978), wherein the Commission was required to order AT&T to interconnect with MCI for provision of its service.

^{5/} 67 FCC 2d 757 (1978), 72 FCC 2d 222 (1979).

Following its Specialized Common Carrier Decision, the Commission initiated its policy of open entry, open skies in the provision of domestic satellite service.^{6/} From my perspective, while heading up the International and Satellite Branch at the FCC, the contrast between development and innovation in the domestic satellite industry with our hamstrung efforts to further innovation in the provision of international services became increasingly apparent. While numerous vendors sought authority to build, launch and utilize domestic satellites for private line, data services and video transmission, we were hard pressed to authorize one or two additional entrants in the international area. A colleague of mine at the FCC said that one of the reasons for successful implementation of the domestic satellite policy was the fact that the processing staff for domestic satellite applications generally included no more than one attorney. Thus, legal obstacles were not seen as serious barriers. There may have been some truth to this observation. However, in the international area, our staff was burdened with the Section 222 of the Communications Act, case law requiring assessment of competitive impact, as well as carriers -- and attorneys -- well skilled in the art of filing pleadings to protract consideration of any application perceived as a "competitive" threat.

Thus, while the last decade witnessed dramatic advances in the U.S. domestic telecommunications market, the international marketplace was not comparably stimulated. Demand for new service offerings had not grown as quickly and advances in technology

6/ 35 FCC 2d 844 (1972), recon. 38 FCC 2d 665 (1972).

have not been implemented as rapidly as in the domestic marketplace. Nevertheless, the picture is changing. We can foresee that as more consumers come to rely upon sophisticated and innovative services offered domestically, they will demand that these services be offered internationally as well.

We have seen evidence of that phenomenon in the last few years. In February of 1976, an application was filed by Graphnet Systems, Inc. for authority to introduce a new facsimile service between the United States and European points. In May, Telenet Communications Corporation filed an application to provide its public packet-switched data communications service between the United States and the United Kingdom. Both Graphnet and Telenet operated within the domestic United States and sought to extend the availability of those services offered domestically to international points.

The Commission found that the applications were in response to a fast growing need for overseas data communications services which was not being met by existing service offerings.^{7/} Relying upon the independent projections of the future of international telecommunications, the Commission foresaw phenomenal growth in the number of data terminals in use -- and the consequent need for efficient international data communications services.

Although Graphnet and Telenet do not now offer their services directly, international services such as they proposed in 1976 have become available through interconnection with the U.S. international record carriers and their foreign correspondents. In fact, interactive computer-to-computer services have now been introduced between the United States and a host of other countries, reflecting

^{7/} See Graphnet Systems, Inc., 63 FCC 2d 402 (1977), recon. den. 67 FCC 2d 1020 (1978).

a significant demand for these services. That demand clearly stems from the growing reliance on such services provided domestically, both within the United States and other countries. As other new services develop domestically, we can expect that demand will increase for the provision of those services internationally.

To respond to those needs, the Commission in December 1979 acted to extend a U.S. policy of competition already well activated domestically to provision of international services. The Commission acted to permit AT&T to offer an international DATAPHONE service, to expand IRCs' offerings of international data services such as DATEL, to expand the scope of IRCs' operations in the United States and increase interconnection opportunities with Western Union, to permit provision of international service by Western Union and to authorize entry into international markets of certain "resale" entities.^{8/} In addition, the Commission concluded its inquiry into the earnings of the international carriers without specific action, stating its belief that its other actions in regard to international communications would subject the carriers to marketplace forces, thereby lowering rates of return and obviating the need for rate proceedings.^{9/}

A number of the Commission's December actions relied on somewhat novel interpretations of Section 222. In fact, the U. S. Court of Appeals for the 2nd Circuit, on August 25, 1980,

^{8/} International Gateways, 76 FCC 2d 115 (1979),* International DATAPHONE, 75 FCC 2d 682 (1979),* International DATEL, 76 FCC 2d 166 (1979),* Interface of International and Domestic Telex and TWX Services, 76 FCC 2d 61 (1979),* New Telex Service Arrangements Via Mexico and Canada, 75 FCC 2d 461 (1979),* Consortium Communications, Inc. 76 FCC 2d 15 (1979), International Relay, Inc., FCC 80-222, released May 5, 1980, Comsat Study, FCC 80-218, released May 1, 1980. * denotes decision is on appeal.

^{9/} See International Audit and Study, 75 FCC 2d 726 (1979).

vacated the Commission's order permitting Western Union to provide international service via Canada and Mexico.^{10/} Similarly, most of the Commission's other December actions are undergoing legal challenge. Despite a law degree and years of experience in the telecommunications field, I cannot predict which of the Commission's actions are likely to be successful in the courts. None of us can. The only thing about which we can be sure is that we face an era of uncertainty unless current attempts to revise the Communications Act of 1934 are successful.

The 1934 Act is no longer adequate as a statement of U.S. national policy. The events of the last ten years in the domestic marketplace have shown that a national policy favoring competition in the provision of telecommunications services can now bring significantly greater benefits to the consumer than a national policy favoring regulation. Only by stretching the law to its limits have we made the strides we have domestically. Almost all observers of the domestic scene now agree that some changes are necessary to accommodate the industries grown so large and dynamic. If Congress fails to make these changes, the inevitable consequence will be a continuation of a long series of disruptive regulatory and court challenges which will find telecommunications policy being established by our judiciary system under the inadequate guidance of an outdated statute.

The same criticisms apply even more poignantly to the international sphere. As U.S. domestic industries grow, the pressures to accommodate that growth internationally will become more acute.

^{10/} ITT World Communications, Inc. et. al. v. FCC and Western Union, et. al., Docket Nos. 79-4220, 80-4003, 80-4014, slip. op. issued August 25, 1980.

Not only does the existing law constrain innovation and flexibility both domestically and internationally, it also fails to provide a scheme for the recognition of the mutuality of international telecommunications.

In May 1980 the Commission instituted proceedings which expressed its tentative belief that resale and sharing of services should be extended internationally and that COMSAT should be permitted to offer retail satellite services.^{11/} These contemplated actions highlight the fact that provision of international telecommunications is a cooperative venture between nations. This fact has been noted in numerous comments filed in these proceedings, and was discussed extensively in NTIA's own filing in the International Resale proceeding.

Following the authorization of Graphnet and Telenet to provide international service, we have witnessed the reluctance of overseas correspondents to consider the introduction of either new carriers or new services. The provision of international communications is a mutual undertaking: no partner can unilaterally introduce a new service and no new carrier can operate without at least the tacit acceptance of the correspondent. There may be many reasons for reluctance on the part of our correspondents, including a desire to be convinced of the economic and technical feasibility of a service or an urge to allow development of a domestic industry.

At NTIA, we respect these policies, as we hope that our policies are equally respected. In fact, we are seeking revisions of the 1934 Communications Act that will provide a framework

^{11/} International Resale and Shared Use, CC Docket 80-176, FCC 80-220, released May 19, 1980 and Authorized User, CC Docket 80-170, 77 FCC 2d 148 (1980).

for mutual respect. Changes in the Communications Act of 1934, when they come -- and they will come, will include changes in the approach to international telecommunications. You will see a clear statement of national policy favoring competition; you will see a recognition of the cooperative nature of international telecommunications; and you will see specific revisions designed to create a more flexible environment for our service providers and a more beneficial environment for our consumers.

This will become, I am firmly convinced, the legislatively mandated direction of U.S. international telecommunications for the rest of this century.